RESPONSE REQUESTED

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No. 05-9264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE PETITION

Issue I

The Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

In its brief in opposition, the government argues that Mr. James' Florida state conviction for possession of 200 to 400 grams of cocaine was a serious drug offense under 18 U.S.C. § 924(e). *See* Brief in Opposition at 5-9. Mr. James submits that the government's argument is contrary to this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), and the applicable state statute, as interpreted by the Florida Supreme Court. As such, this Court should grant the petition.

In *Taylor*, this Court stated that in deciding whether a crime qualifies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a sentencing court should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Taylor*, 495 U.S. at 600-602. This categorical approach, which is consistent with the statutory language as well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction, *see id.* at 601, as well as Sixth Amendment problems. *See Shepard v. United States,* 544 U.S. 13 (2005).

The government is implicitly asking this Court to ignore the categorical approach mandated in *Taylor*. Rather than looking at the statutory definition of the

crime charged, the government is asking this Court to look at the actual facts of Mr. James' prior conviction. Specifically, Mr. James' prior conviction was for possession of 200 to 400 grams of cocaine. Nothing in the statute to which Mr. James was convicted required implicitly or explicitly that the cocaine be possessed with the intent to manufacture or distribute. Although Mr. James was convicted of mere possession of cocaine, the government seeks to alter Mr. James' prior conviction, by reading into the statute that the offense involved possession with intent to manufacture or distribute.

Such an interpretation of the statute clearly violates this Court's mandate that a categorical approach be used to decide whether the offense qualifies under the ACCA. Additionally, the government's interpretation specifically contradicts the Florida Supreme Court's interpretation of the statute. In *Gibbs v. State*, 698 So.2d 1206, 1206 (Fla. 1997), the Florida Supreme Court was asked to address whether a person could be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine. The Florida Supreme Court held that the elements in the statute prohibiting trafficking possession were not different from the elements in the statute prohibiting simple possession. *Id.* at 1208-1209. By so holding, the Court found that the quantity requirement of trafficking possession was not a separate element, thus, the State was not allowed the dual prosecution of both trafficking possession and simple possession arising out of the possession of the same cocaine. *Id.* at 1209. Additionally, the Court stated that "the gravamen of the crime underlying each statute is the possession of an illegal drug." *Id.*

More important, however, the Court stated that:

> The conduct element of the drug trafficking statute is not compared by considering the entire range of conduct including possession, sale, purchase, and delivery, but rather by comparing only trafficking possession with simple possession. This is a different situation from a case in which the defendant is charged with both trafficking sale and simple possession, because the sale element of the trafficking statute differs from the elements in the simple possession statute.

Id. at 1209-1210. The Florida Supreme Court clearly indicates that trafficking possession in Florida **does not** involve distribution or manufacture, or the possession with intent to distribute or manufacture.

The government asks this Court to ignore the Florida Supreme Court's interpretation of the statute in question. Although this Court stated in *Taylor* that the definition of a qualifying state offense under the ACCA is a matter of federal law, *see Taylor*, 495 U.S. at 590-591, that does not equate with totally ignoring how the state offense is interpreted by the highest court within that state. For example, although the Florida Supreme Court could not rule, consistent with *Taylor*, that trafficking possession in Florida is or is not a serious drug offense under the ACCA, the Florida Supreme Court has clearly and unequivocally held that a trafficking possession conviction in Florida does not need to involve distribution or manufacture, or the possession with intent to distribute or manufacture. A federal court must accept the Florida Supreme Court's interpretation of its own state statute.

Although the possession of a large quantity of drugs might lead to an inference that the person intended to distribute or manufacture the drugs, Florida law does not require the inference as a matter of law. Under the categorical approach required under *Taylor*, and because the government failed to provide any admissible documents that Mr. James' drug conviction really did involve the manufacturing, distributing, or possessing with intent to manufacture or distribute cocaine, Mr.

James' drug conviction was not a serious drug offense under the ACCA.

Issue II

The Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

In stark contrast to the possession of cocaine conviction in the previous section, the government asks this Court to look to state law to determine whether Mr. James prior attempted burglary conviction qualifies under the ACCA. Mr. James submits that an examination of circuit law alone establishes the need for certiorari review. However, for the reasons that follow, an examination of state law bolsters Mr. James' claim that his Florida attempted burglary conviction does not qualify under the ACCA. At a minimum, an examination of state law conclusively demonstrates that a circuit conflict exists on whether an attempted burglary conviction qualifies under the ACCA.

In its brief, the government states that criminal attempts in Florida are different from criminal attempts in Washington, Utah, Oklahoma, and Texas. *See* Government Brief in Opposition at 10-13. Surprisingly, the government makes this bold statement without actually comparing and contrasting the statutes/laws in question. A comparison shows that Florida's criminal attempt law is similar to the laws in Washington, Utah, Oklahoma, and Texas. In fact, for the reasons that follow, Mr. James submits that the laws in Washington and Utah are closer to qualifying under the ACCA than the law in Florida. In Florida, the elements of attempted burglary are (1) the intent to commit burglary, and (2) some overt act directed toward its commission. *See Jones v. State*, 608 So.2d 797, 798 (Fla. 1992).

Washington defines the crime of attempt as follows: (1) the intent to commit a specific crime; and (2) a substantial step toward the commission of that crime. *See State v. Vermillion*, 832 P.2d 95, 101 (Wash. Ct. App. 1992); *United States v. Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994). Utah similarly requires the intent to commit the crime and a substantial step toward the commission if the crime. *See* Utah Code Ann. § 76-4-101; *State v. Pearson*, 680 P.2d 406, 407-408 (Utah 1984); *United States v. Strahl*, 958 F.2d 980, 986 (10th Cir. 1992). Both Washington and Utah require a substantial step toward the commission of the offense - a higher standard than some overt act directed toward the commission of the offense, as required in Florida.[1] The Oklahoma attempt statute provides: "Every person who attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof . . . ." Okla. Stat. tit. 21, § 42 (1991); *United States v. Permenter*, 969 F.2d 911, 913 (10th Cir. 1992). Texas similarly provides that an attempt burglary is any act amounting to more than mere preparation that tends but fails to effect a burglary. *United States v. Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992); *Molenda v. State*, 715 S.W.2d 651, 653 (Tex. Crim. App. 1986); Tex. Penal Code Ann. §§ 15.01, 30.02.

In contrast to these laws, including Florida, other circuits have dealt with laws requiring the step to come within dangerous proximity to completion. *See, e.g., United States v. Davis*, 16 F.3d 212, 218 (7th Cir. 1994) (interpreting the Illinois statute to require "dangerous proximity to success" to be convicted under the attempt

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[1]Webster's Ninth Collegiate Dictionary (1983) defines "substantial" as important or essential. Webster's Ninth Collegiate Dictionary (1983) defines "overt" as "to open to view."

statute); *United States v. Payne*, 966 F.2d 4, 9 (1st Cir. 1992) (interpreting Massachusetts breaking-and-entering law to require that the defendant came close enough to premises to risk confrontation). *See also, Weekley*, 24 F.3d at 1127 n.2 (discussing various circuit's interpretation of state laws).

The government also makes a bold and incorrect statement that Florida law requires "**far** more than mere preparation." Government Brief in Opposition at 11. It is unclear how the government makes such an assertion (especially as it cites no case law in support of the assertion), as no case from Florida, nor the statute, has ever used the phrase "far more than mere preparation." Some Florida cases, including the case cited by the government, *Gustine v. State*, 97 So. 207 (Fla. 1923)(dealing with an attempted theft of a car), mention the phrase "beyond mere preparation." Specifically, the *Gustine* court defined an attempt as:

> **Generally**, there must be an intent to commit a crime, coupled with an overt act apparently adapted to effect that intent, carried beyond mere preparation, but falling short of execution of the ultimate design.

Id. at 208 (emphasis added). The Florida Supreme Court, in 1923, cited various sources, including Bouvier's Law Dict. (3d Rev.) vol. 1, title "Attempt," as a source for the definition. The court did not cite to any Florida case law or statute as a source for the definition. Whereas, in *Jones*, the Florida Supreme Court cited specifically to § 777.04(1), Fla. Stat., as its primary source for the definition of attempt. *Jones*, 608 So.2d at 798. Moreover, the Court cited to the Florida Standard Jury Instructions in Criminal Cases in further defining the crime of attempt: "(Defendant) did some act toward committing the crime of (crime attempted) **that went beyond just thinking or talking about it**. . . ." *Id.* (quoting Fla. Std. Jury Instr. (Crim.) at 55)(emphasis added).

Even assuming the *Gustine* definition of attempt applies in Florida, Utah has interpreted the requirement of its substantial step as something "more than mere preparation." *State v. Johnson*, 821 P.2d 1150, 1157 (Utah 1991). Thus, contrary to the government's assertion, Florida has defined the crime of attempt in a manner consistent and similar to the laws in Washington, Utah, Oklahoma, and Texas.

Finally, in an attempt to convince this Court that Mr. James' attempted burglary conviction should qualify under the ACCA (even though the Florida law would not otherwise qualify), the government provides specific "facts" regarding Mr. James' attempted burglary conviction. *See* Government Brief in Opposition at 11 (citing the Government's Brief in the Eleventh Circuit). Quite cleverly, the government chose to cite its earlier brief for specific "facts" regarding Mr. James' prior conviction, rather than informing this Court that the "facts" came from the Presentence Investigation Report (PSR). Clearly, this Court has rejected the use of information from the PSR as a source for determining whether the prior conviction qualifies under the ACCA. *See Shepard v. United States,* 544 U.S. 13 (2005). In *Shepard*, this Court rejected the government's contention that police reports could be used to determine whether a conviction qualified under the ACCA; rather, this Court held that the inquiry permitted under *Taylor* "is limited to the terms of the charging document, the terms of the plea agreement or transcript of the factual colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information." *Shepard*, 544 U.S. at 26.

The government's attempt to ignore *Shepard* should be rejected. As clearly demonstrated above, a conflict clearly exists among the circuits, despite the

government's unsupported assertions to the contrary. As such, this Court should grant this petition to resolve this circuit conflict.

CONCLUSION

Based on the reasoning and citations of authority set forth above and in Mr. James' petition for writ of certiorari, Mr. James requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted this 18th day of May 2006.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

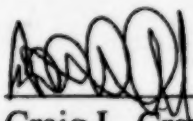
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 18th day of May 2006, true copies of the *Reply to Brief in Opposition* were sent by Federal Express Standard Overnight to Sangita K. Rao, Office of the Solicitor General of the United States, Room 5712, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 (Respondent); Karin B. Hoppmann, Assistant U.S. Attorney, U.S. Attorney's Office, 400 N. Tampa Street, Ste. 3200, Tampa, Florida 33602; and Alphonso James, Jr., Register No. 33689-018, FCI Coleman Low, PO Box 1031, Coleman, FL 33521. All parties required to be served

have been served.

EXECUTED this 18th day of May 2006.

R. Fletcher Peacock
Federal Public Defender



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Case No. 05-9264

Dear Mr. Suter:

Enclosed please find an original and ten copies of the *Reply to Brief in Opposition* and an original *Certificate of Service* for filing on behalf of the petitioner.

Sincerely,

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Enclosures

cc: *Sangita K. Rao, Office of the Solicitor General*
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